SUPREME COURT, U. S.

No. 945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG, and THOMAS R. BENZ,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, an Illinois corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on September 23, 1966, rehearing denied on October 27, 1966.

In the case below the State of Illinois and the City of Chicago intervened as additional party plaintiffs in support of petitioners' position (Statement, p. 11, *infra*). Petitioners are taxpayers whose right to sue has been recognized by the Supreme Court of Illinois in the two appeals to that court from the trial court in the instant case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois for which review is sought (R. 5-23) is reported in —— Ill.2d ——; 220 N.E.2d 415, and is printed in the Appendix hereto, pp. 3-27.

The opinion of the trial court (R. 4, Pages 537-542), granting Respondent's motion to dismiss the amended complaint, is not reported. This opinion is printed in the Appendix hereto, pp. 31-35.

JURISDICTION

The judgment of the Supreme Court of Illinois sought to be reviewed, affirming on direct appeal the trial court's decree, was dated and entered on September 23, 1966 (R. 24) and is printed in the Appendix hereto, pp. 29-30. A timely petition for rehearing filed on October 7, 1966 (R. 25, 26, 27, 28) was denied on October 27, 1966 (R. 29; App. 28). The trial court's decree dismissing the amended complaint was dated and entered on October 28, 1965 (R. 4, pp. 542-543) and is printed in the Appendix hereto, pp. 36-37.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The federal questions sought to be reviewed were timely and properly raised in the complaint filed in the trial court and in a brief submitted to the Supreme Court of Illinois as detailed in the Statement, p. 6, at 10, 13 *infra*.

QUESTIONS PRESENTED

The State of Illinois and the Illinois Central Railroad were parties to a suit, 146 US 387, 184 US 77, in which an 1888 federal decree, predicated upon federal questions, adjudicated that certain lands, originally consisting of submerged lands in Lake Michigan granted to the State pursuant to Congressional Acts when the State was incorporated, were owned by the State in trust for the People of the State. The air rights alone over these lands are now worth hundreds of millions of dollars, are along Chicago's lake front and are of crucial public importance.

In twice affirming the decree, this Court adjudicated that the trust impressed upon the title of the State to these lands was of a special character which prevented the State from being divested of such title except for public purposes in the best interests of all the People. Even the Illinois Legislature, according to this Court's holding, could not disavow this trust by giving the title to these lands to the railroad solely for its private gain and purposes. (The same trust was held by this Court to attach to the submerged lands of the Great Lakes owned by all of the states bordering these lakes.)

Petitioners here seek to enforce said federal decree against the railroad as *res judicata* and to prevent the railroad from usurping the title to these lands and air rights. By its judgment below, the Illinois Supreme Court has now given the railroad title to these lands and air rights on the sole ground that the State was barred by laches and estoppel from asserting its title under the 1888 federal decree. The Court held that local public agencies and officials, by their conduct in disavowing the State's title, caused the State to lose its title to these lands and air rights. (These agencies and officials had no authority from the State to dispose of State property; on the contrary, their duties required them to protect the State's title.) The questions presented are:

1. Did the Illinois Supreme Court violate the jurisdiction and judicial power vested in this Court by Sections 1 and 2 of Article III and the Supremacy Clause (Article VI) of the Constitution of the United States:

a. by failing to give effect to the 1888 federal decree as *res judicata*, the State and the railroad having been parties to both the instant case and the earlier case in which the 1888 decree was entered and the lands encompassed by said decree having been involved in the instant case?

b. by giving title to these lands to the railroad and thereby nullifying the 1888 federal decree which had adjudicated that said federal trust attached to the State's title to these lands and prevented the lands from being given away to private interests except for a public purpose?

c. by avoiding the significance of the 1888 federal decree and formulating as a matter of state law a doctrine of estoppel and laches, plainly untenable (as the railroad was a party to the 1888 decree), instead of deciding the merits of this case? Can the Illinois Supreme Court thus become the final arbiter of said federal decree?

2. Can any branch of any state government, bordering on the Great Lakes, by a state court decree, state statute or conduct of administrative state officials give the title to the submerged lands of the State in these lakes to private interests for non-public purposes without violating the federal trust adjudicated by this Court regarding such lands?

3. Did the court below, by failing to recognize and give full effect to said 1888 federal decree, deprive the People of the State of Illinois and the petitioners, the beneficiaries of said trust, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Article III, Sections 1 and 2:

> "Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . "
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . "

United States Constitution, XIVth Amendment:

> " . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3 Stat. at Large 428 (April 18, 1818), Chap. LXVII.—"An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states." This statute is printed in Appendix hereto, pp. App. 1-2.

3 Stat. at Large 536 (December 3, 1818), "RESOLUTION declaring the admission of the state of Illinois into the Union." This statute is printed in Appendix hereto, p. App. 2.

STATEMENT

As the court below observes, the factual background of this case is highly complex (App. p. 6). It involves six years of litigation in the Illinois courts, previous litigation before this Court and in the State courts and events going back to 1851.

This case is an outgrowth of the decisions of this Court in *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, and *Illinois ex rel. Hunt* v. *Illinois Central Railroad Co.*, 184 U.S. 77, twice affirming on appeal a decree entered in 1888 by the then Circuit Court of the United States for the Northern District of Illinois, 33 F. 730, and the United States Circuit Court of Appeals (7th Cir.), 91 F. 955.

These earlier federal opinions, known as the "Lake Front Cases", involved the State of Illinois, the City of Chicago and the Illinois Central Railroad Co., all parties to the instant case. A crucial portion of the same land is involved in the instant case — the lakefront lands in the City of Chicago between the Chicago River and 16th Street (146 U.S. 387, 433), an area almost the size of, and immediately adjacent to, downtown Chicago. The balance of the lands involved in the instant case stretch approximately four and one-half miles along the lakefront south of 16th Street. (See maps at R. 3, pages 243, 249; and R. 4, pages 366 and 367, Exhibit S-1).

Today, the air rights appurtenant to these lands alone are worth hundreds of millions of dollars.

The instant case was filed against the respondent, Illinois Central Railroad Co., in 1960 in the Circuit Court of Cook County, Illinois by petitioners, suing on behalf of the State of Illinois and the City of Chicago, in petitioners' various capacities as taxpayers, citizens and voters of the State of Illinois and the City of Chicago, as citizens of the United States, and also pursuant to certain Illinois Acts which gave them the statutory right to sue on behalf of the State and the City (R. 3, pages 179-182).*

The State of Illinois and the City of Chicago were additional parties plaintiff in the Court below in support of petitioners' position, as hereinafter noted. The matter was decided on the pleadings and the relevant portions thereof are summarized here. Petitioners' amended complaint (R. 3, pages 179-270) alleges that:

ALLEGATIONS OF PETITIONERS' COMPLAINT

All of the lands in question were created by the railroad filling in from the natural shoreline of 1852 the submerged waters of Lake Michigan in progressive stages beginning in 1852 until sometime after 1930 (R. 3, pages 183-186).

A portion of the lands were so reclaimed pursuant to the authority granted the railroad in the 1851 charter it received from the State Legislature to *use* the waters of

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* In 1959 the same plaintiffs suing as state and federal taxpayers filed a suit against the Illinois Central Railroad Co. in the federal courts seeking to recover on behalf of the State of Illinois and the City of Chicago a portion of the lands and air rights involved in the instant case, *Hickey, et al.* v. *Illinois Central Railroad Co.*, (7th Cir. 1960), 278 F.2d 529, cert. den., 364 U.S. 918. The latter case, however, did not involve the same legal issues, and particularly did not involve the federal constitutional questions, presented in the instant case. Pursuant to the decision of the United States Court of Appeals in that case that it was a matter for the state courts to decide whether petitioners could sue as state taxpayers, petitioners filed the instant case in the state courts.

Lake Michigan for railroad purposes. The Charter required the railroad to obtain the consent of the City, which was obtained by various ordinances (R. 3, page 188). But neither the Charter from the State nor the ordinances purported to convey title to the railroad (R. 3, page 195).

A portion of the lands were created by filling pier structures, and slips between these structures, the railroad had built into the lake. This was in violation of this Court's permanent injunction issued in the Lake Front Cases enjoining the railroad from further filling in the slips and the waters of Lake Michigan, 184 U.S. 77, 87 (R. 3, page 185). (The Court below appears to acknowledge this violation (App. p. 11).)

Upon its admission to the Union in 1818, Congress granted to the State of Illinois in trust for the People the title to all of the submerged lands between the State's natural shoreline and the middle of the lake, 3 Stat. at Large 428 (April 18, 1818) App. 1-2; 3 Stat. at Large 536 (December 3, 1818) App. 2; (R. 3, page 187). The lands in question were filled in subsequent to 1818 and, by operation of law, such reclaimed submerged lands were impressed with the same trust in the public interest and the State forthwith became the owner thereof (R. 3, page 187).

The State has since always held and does now hold the title and ownership of these reclaimed lands in trust for the People of the State subject to such title thereto or other rights therein as may have been granted by the State to the City of Chicago and subject further to the railroad's easement for railroad purposes only (R. 3, page 187).

The complaint further alleges that in the Lake Front Cases, 146 U.S. 387; 184 U.S. 77, this Court adjudicated that the reclaimed and submerged lands encompassed by the 1888 decree, comprising a major portion of the lands involved in the instant case, were owned in fee by the State of Illinois in trust for the People of the State for public purposes; that the railroad had only an easement for railroad purposes in these lands, and by reclaiming them from the submerged waters of Lake Michigan never acquired any title thereto nor the right to dispose of same to others by way of deed or otherwise; that said decree gave the railroad title to certain pier structures the railroad had built out into the lake but not to the state owned bed of the lake underneath the piers; that said decree perpetually enjoined the railroad from filling in the slips between the piers or any more of Lake Michigan; that since the Lake Front Cases the railroad removed the piers and filled in the waters in the area formerly occupied by said structures, and also the water in the former slips, presently constituting vast areas of reclaimed land between the Chicago River and 16th Street, all in violation of said perpetual federal injunction.

Further, it is now wrongfully asserting the ownership and dominion over these immensely valuable lands and air rights appurtenant thereto for its private gain and in denial of the public's rightful title thereto; that the violation of said permanent injunction constituted a violation of a federal right which should be protected by the state courts (R. 3, pages 191-192).

ALLEGATIONS OF PETITIONERS' COMPLAINT RAISING FEDERAL QUESTIONS

The complaint emphasized that the Lake Front Cases were *res judicata* on the fact that the State owned the title in fee to all of the lands encompassed in the decree in trust for the People, subject to an easement in favor

of the railroad for railroad purposes only; that in the event the state court should fail to recognize and give full force and effect to said federal court adjudications by declaring and decreeing that the railroad had no title to these reclaimed lands, such failure would constitute an abrogation of the judicial power of the United States in violation of Sections 1 and 2 of Article III of the Constitution of the United States and would also deprive the people and citizens, and the plaintiffs in their various representative capacities, of rights, privileges and immunities arising under the Fourteenth Amendment to the Constitution of the United States (R. 3, pages 193-195, 222, 232-234).

The complaint also alleges that the railroad claims title to these lands under the 1930 and 1912-1913 decrees entered by Illinois trial courts in non-adversary boundary line proceedings referred to in the opinion of the court below (App. pp. 14, 8, 11); that these decrees were void because these proceedings were purely statutory in nature and the statute expressly applied to, and became legally operative only with respect to true owners of shorelands (and riparian rights appurtenant thereto), which the railroad was not, because the Lake Front Cases had adjudicated that the State owned the shorelands and riparian rights involved in these State proceedings (R. 3, pages 196-217). Further, that said state court decrees and the statute upon which they were based, as so construed by said decrees, were in violation of the Fourteenth Amendment to the Constitution of the United States as the effect of said decrees was to make a wrongful gift or donation to a private corporation of these lands so adjudicated by the federal courts to be publicly owned, and as such constituted action by the State Government which deprived the People of the State, and the petitioners in their various representative capacities, of property without due process of law (R. 3, page 232).

The complaint sought a declaration by the state court that the lands and air rights in question belong to the State and that the railroads be required to turn over to the State all proceeds from all sales which it had made of portions of these lands and air rights and that the railroad be enjoined from making any other dispositions of this property (R. 3, pages 233-236).

In 1962 the City of Chicago intervened and adopted the amended complaint of petitioners (R. 3, pages 290-295). Subsequently, the Attorney General of the State of Illinois intervened and filed in the trial court an intervening complaint expressly aligning the State of Illinois with, and in support of the position of, the petitioners and the City of Chicago. The Attorney General's complaint in substance adopted petitioner's complaint, except for the said federal constitutional questions (R. 4, pages 334-367).

THE PLEADINGS OF RESPONDENT

The railroad filed a motion to dismiss the petitioners' and City's complaint (R. 3, pages 2-6, 178, 271-275) and an answer to the State's intervening complaint (R. 4, pages 368-518). The State filed a reply (R. 4, pages 518-528). Thereupon, the railroad filed a motion for judgment on the pleadings as against the State (R. 4, pages 532-535) and the trial court heard the motions simultaneously, as the complaints presented common legal issues (R. 4, pages 535-536).

The railroad's aforesaid pleadings directed against all the complaints asserted that the railroad owned these lands by reason of the Lake Front Decisions, 146 U.S. 387, 184 U.S. 77, which the railroad conceded to be *res judicata* on the parties, the boundary line decrees of 1930 and 1912-1913, and because of laches and estoppel arising out of the conduct of State and City officials. The rail-

road's pleadings denied any violation of this Court's permanent injunction because the filling in of the slips was done with the consent of the Department of Public Works of the State of Illinois, the City of Chicago and the Corps of Engineers (R. 3, page 9; R. 4, pages 389, 396, 397, 419).

The trial court's decree in the case below granted both motions and adjudicated that "defendant Illinois Central Railroad Company is the owner in fee simple of all the lands claimed in this cause by the State of Illinois and the City of Chicago, or on their behalf, between the Chicago River and the north line of Randolph Street and south of 11th Place, or Park Row, in the City of Chicago, Cook County, Illinois" (R. 4, page 542). The trial court interpreted the 1888 federal decree entered in the Lake Front cases as vesting title in fee simple in the railroad (R. 4, pages 537-542) to all of that portion of the lands involved in the instant case encompassed by said decree.

The railroad has conceded that the Lake Front Cases adjudicated that the City owned that portion of the original lands in question between Randolph Street and 11th Place, commonly known as Grant Park, subject to the railroad's easement for railroad purposes only. Accordingly, the said trial court decree did not include that portion of the City owned lands (R. 4, pages 542-543). This, of course, was in accord with petitioners' allegations. As a result, the only lands involved on the subsequent appeal to the Illinois Supreme Court were those claimed on behalf of the State.

The trial court did not rule on the question of laches and estoppel raised by the railroad and its opinion makes no reference thereto (R. 4, pages 537-542).

The attempts of the taxpayers to have discovery to disprove the existence of innocent purchasers of value from

the railroad of the air rights herein involved were prohibited by the trial court (R. 3, pages 279-289, R. 4, pages 528-536).

On appeal to the Supreme Court of Illinois by petitioners, the State of Illinois and the City of Chicago, acting jointly, that court affirmed the trial court's decree solely on the ground of estoppel and laches. It carefully noted that it was not passing upon the issue as to whether the Lake Front Cases gave title to these lands to the State or the railroad (App. p. 23).

Instead, it held that the disavowal of the State's title by various State and City agencies and officials (who had no authority to dispose of the State's title) barred the State from asserting the title it claimed under the Lake Front Cases, 146 U.S. 387, 184 U.S. 77. In so doing, the court failed to pass upon the federal constitutional questions raised in petitioners' complaint hereinbefore mentioned, and in petitioners' brief filed with the Supreme Court of Illinois attacking the trial court's decree (Supplemental Record, pages 2-4).

REASONS FOR GRANTING THE WRIT

The judgment of the court below squarely presents to this Court substantial federal questions involving a federal-state conflict of national importance with reference to the submerged lands of the Great Lakes. The answers to these questions will decide whether the State of Illinois or the Illinois Central Railroad owns the miles of lands and air rights involved in the instant case worth hundreds of millions of dollars and of crucial public importance.

I.

The decision of the Illinois Supreme Court is in conflict with the decisions of this Court in *Illinois Central Railroad Co.* v. *People of the State of Illinois and the City of Chicago,* 146 U.S. 387, and *Illinois ex rel. Hunt* v. *Illinois Central R. Co.,* 184 U.S. 77, twice affirming on appeal the decree entered in 1888 by the then Circuit Court of the United States for the Northern District of Illinois, 33 F. 730 (1888) and the United States Circuit Court of Appeals (7th Cir., 1899), 91 F. 955. These federal opinions, known as the "Lake Front Cases", involved the identical parties and a crucial portion of the land as in the instant case, and are *res judicata* in favor of the State and the People as to the issues herein.

The case at bar is in the nature of a bill in equity in aid of the federal decree entered in the Lake Front Cases in 1888. It is an appropriate method of securing on behalf of the State of Illinois and the People the benefits of the Lake Front decree when subsequent events have made necessary some further relief in order that the State and the People may enjoy the full fruits of their victory in the Lake Front Cases. *Independent Coal & Coke Co.* v. *United States,* 274 U.S. 640.

The Lake Front Cases held the reclaimed and submerged lands of Lake Michigan encompassed by the decree therein, now of immense value and of vast public importance, were owned in fee by the State in trust for the People of Illinois "for purposes in which the whole People are interested . . . for public use". 146 U.S. 452, 456 and 457.* This Court further held that even the Illinois Legislature could not nullify this trust. Title to these lands could not be given to the Ilinois Central Railroad for its private gain, for a non-public purpose. 146 U.S. 452-460.

Yet, now, sixty-four years later, the Illinois Supreme Court, ignoring *res judicata*, nullifies the 1888 decree of the United States Circuit Court, twice affirmed by this Court in the Lake Front Cases.

The principal issue before the Court below involved a construction of this 1888 decree as to whether it vested title to these lands in the State in trust for the People, as the petitioners contend, or whether said decree vested title in the railroad, as the latter contends. The state court sidestepped this issue. It ignored the holdings of the Lake Front decisions. It innovated a doctrine of estoppel and laches in an attempt to avoid the impact of the Lake Front decree. The State now is precluded from asserting title to these lands because some public officials, who had no authority to dispose of title and rights to the lands, failed to protect the public trust from usurpation by the railroad.

Never before has the State of Illinois been stripped of any lands by this estoppel and laches formula, let alone

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* The only interest the railroad obtained by the 1888 decree was a railroad easement and title to certain piers and other structures, but not the State's title to the bed of the lake upon which they were constructed. 184 U.S. at 85.

reclaimed and submerged lands subject to the federally endowed trust.

NATURE OF THE TRUST

The Lake Front Cases adjudicated that this trust is of a unique character:

> "But it is a title *different* in character from that which the State holds in lands intended for sale . . . It is a title held in trust for the People of the State . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, *cannot be relinquished by a transfer of property.* The control of the State for the purposes of the trust *can never be lost,* except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining . . . The State *can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties,* except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace* . . . The trust with which they are held, therefore, is *governmental and cannot be alienated,* except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." 146 U.S. at 452, 453, 455, and 456. (Emphasis added.)

The Lake Front decisions were a final determination, and *res judicata,* of the character of the trust impressed upon the State's title to the reclaimed and submerged lands.

This title is incapable of being destroyed through estoppel or laches in the same manner as this Court held in *United States* v. *California,* 332 U.S. 19. There it was decided that the United States could not be estopped from asserting its title to its tide lands where federal agencies and officials, over a period of many years, had disavowed the ownership of these lands.

> "As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for the private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. 19, at 40.

Likewise, in the instant case, none of the public agencies or officials had any authority to dispose of State property. Nor were the air rights herein (now worth hundreds of millions of dollars, App. p. 5) of significance until just prior to the filing of petitioners' complaint.

Because the Lake Front decisions were *res judicata* on the title to the lands owned by the State and upon the nature of the trust impressed upon such title, the court below lacked the jurisdiction and power to formulate a doc-

trine of estoppel and laches under State law which for all practical purposes nullified the title the State received under the decree of 1888 in the Lake Front Cases. By attempting to do so, the Court below usurped the judicial powers vested in this Court by Sections 1 and 2, Article III, and the Supremacy Clause (Article VI) of the United States Constitution.

This trust, of federal origin, impressed upon all the submerged lands off its shores to the middle of Lake Michigan was granted to the State of Illinois by Congressional Acts creating the boundaries of the State and granting the federal lands within such boundaries to the State. (146 U.S. 434, 435; 3 Stat. At Large 428, 536, App. pp. 1-2)

The trust doctrine is founded upon the necessity of preserving to all the People the use of navigable waters, and the submerged lands under the Lake owned by the State are subject always to the paramount right of Congress to control navigation in furtherance of the Congressional power to regulate interstate and foreign commerce. 146 U.S. 435, 436 and 437. Cf. *Sanitary District of Chicago* v. *United States,* 266 U.S. 405, 425, wherein this Court held that the United States may have an "ultimate sovereign interest" in Lake Michigan.

It was solely on the basis of this trust, *and the inability of the State Legislature to disavow said trust,* that this court held the constitutional rights of the Illinois Central Railroad were not violated by an Illinois Act repealing an earlier Act which attempted to grant to the railroad title to the submerged lands involved in the Lake Front Cases for a non-public purpose. 146 U.S. at 460.

The Lake Front Cases therefore plainly involved a construction of the Federal Constitution and the nature of the trust impressed upon the title the State received under

the Congressional Acts. Thus, the petitioners in the instant case are seeking the vindication of federal rights adjudicated by a federal decree in favor of the State.

Petitioners having properly and timely asserted in the State courts below the Lake Front Cases, and the federal decree of 1888 entered therein, as *res judicata,* and the Supreme Court of Illinois having refused to give said federal decisions and decree such effect, a federal question reviewable in this Court under 28 U.S.C. Section 1257 (3), exists. *Stoll* v. *Gottlieb,* 305 U.S. 165, 167; *Dupasseur* v. *Rocherau,* 21 Wall. 130, 134.

Moreover, "whether a federal judgment has been given due force and effect in the state court is a federal question reviewable by this court which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank* v. *Frankfort,* 191 U.S. 499, 515.

The interpretation of the decree entered in the Lake Front Cases concerning the title and the nature of the federal trust, and the methods by which the title can be shorn of such trust, are matters ultimately within the judicial powers of this Court.

On the second appeal in the Lake Front Cases, 184 U.S. 77, this Court refused to reopen the decree affirmed on the first appeal, 146 U.S. 387, for the purpose of litigating an issue decided on the first appeal. This Court on the second appeal held:

> "Every matter embraced by the original decree of the Circuit Court, and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to reexamination on this appeal." 184 U.S. at 93.

When this Court so refused to reopen its own decree, it is evident that the Supreme Court of Illinois cannot now

do so by voiding said decree indirectly through estoppel and laches.

Having adjudicated the title of the State to these lands under the federal decree in the Lake Front Cases, there can be no doubt whatsoever since *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 4 L. Ed. 97 (1816), that this Court may take whatever action it deems necessary to construe, protect and enforce the title vested by said decree against nullification by a State court. State recalcitrance can be met by entry of judgment in this case as in *Martin* v. *Hunter's Lessee.* Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579 (1819); *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23 (1824).

LACHES AND ESTOPPEL ARE PLAINLY UNTENABLE

The court below, in discussing what it states to be the vital question on the estoppel and laches, App. p. 23, cites *Dill* v. *Widman,* 413 Ill. 448:

> "The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts."

There can be no quarrel with this proposition of Illinois law, but it is inapplicable here, for the simple reason that the railroad was a *party* to the Lake Front Cases and, of course, had the "knowledge" as well as "the convenient means of knowing the true facts".

The court below casually nods to the principle of *United States* v. *California,* 332 U.S. 19, but claims "in the context of the extra-ordinary circumstances here prevailing . . . the basic concept of right and justice preclude the State from now asserting any claims to the lands involved". 220 N.E.2d at 426, 427.

The railroad having been a party to the Lake Front Cases, "the basic concept of right and justice" should preclude the railroad from avoiding the *res judicata* effects of the Lake Front decree through any estoppel and laches.

Furthermore, it is difficult to understand how "the basic concept of right and justice" favors the railroad when it filled in a substantial portion of the lands in question after the Lake Front Cases in violation of the injunction issued in those cases perpetually enjoining the railroad from further filling in the lake, 184 U.S. 77, 87.

Moreover, this Court's holding in *United States* v. *California*, 332 U.S. 19, 40, is pertinent for another reason:

> "We have not overlooked California's argument, buttressed by earnest briefs on behalf of other states, that improvements have been made along and near the shores at great expense to public and private agencies. And we note the Government's suggestion that the aggregate value of all these improvements are small in comparison with the tremendous value of the entire three mile belt here in controversy. But however this may be, we are faced with the issue as to whether state or nation has paramount rights in and power over this ocean belt, and that great national question is not dependent upon what expenses may have been incurred upon mistaken assumptions."

In addition, in the instant case the relief sought against the railroad is a declaration that the State owns the lands and air rights in question and that the railroad be required to pay the State such proceeds as the railroad received from purported sales of the air rights to third parties who have been innocent purchasers for value. The fact that the latter may exist (which has not been deter-

mined to date)* would create no estoppel or laches in favor of the railroad. Cf. *Independent Coal & Coke Co.* v. *United States,* 274 U.S. 640.

For the foregoing reasons, on the face of the opinion of the court below, and without resorting to the detailed denials of the railroad's pleadings concerning laches and estoppel, the holding of that court with respect to the latter is plainly untenable. This Court cannot be deprived of its jurisdiction and power to review a state court judgment interposing a non-federal ground of decision which is plainly untenable. *Ward* v. *Love County,* 253 U.S. 17, 22 and 23.

II.

The extent to which the legislative, judicial and executive branches of the states bordering on the Great Lakes have the power to divest their respective states of titles to submerged lands of the lakes held under the federal trust established by this Court in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, is a substantial federal question inherent in this case not heretofore determined by this Court.

The Lake Front Cases held that this federal trust applied to all of the Great Lakes, 146 U.S. at 435, 436 and 437, and it prevented any Great Lake State from being divested of its title to submerged lands in these lakes except for a public purpose in the best interests of all the People, 146 U.S. at 452 and 453.

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* Petitioners were denied their requested discovery aimed at ascertaining whether any innocent purchasers for value existed (R. 3, pages 279-289; R. 4, pages 528-536). The trial court did not pass on laches or estoppel. (See Appendix 31).

Notwithstanding the federal trust imposed upon the titles under which the various states hold their submerged lands in the Great Lakes, the states have assumed that their state laws completely govern the disposition of these lands. As a result there are no uniform safeguards applicable to such dispositions, each state exercising its independent judgment. The Supreme Court of the State of Michigan, for example, *State* v. *Venus of America Land Co.*, 160 Mich. 680, 125 N.W. 770, has held, directly contrary to the Supreme Court of the State of Illinois in the case below, that estoppel and laches will not apply with respect to the submerged lands in the Great Lakes owned by the State of Michigan.

While state law might apply for purposes of deciding riparian rights and similar issues, it should always be subject to the federal trust prohibitions against disposing of these lands to private interests contrary to the public good.

The judgment of the court below emphasizes the urgent need for this Court to emphatically reaffirm the federal trust in the submerged lands of the Great Lakes to prevent further unlawful encroachments on these lands by public officials and state legislatures. In no other way can the submerged lands be protected from further violations of the federal trust, the local laws of the various states being inconsistent and inadequate for that purpose.

In the instant case, any portion of the lands not encompassed by the 1888 decree in the Lake Front Cases are still protected from usurpation by the railroad under the doctrine of the federal trust of submerged lands in the Great Lakes. The disavowal of such trust by public agencies and officials cannot be a legitimate basis for the estoppel and laches upon which the court below based its decision.

The trust, a federal right asserted in the court below, was disregarded. This Court then has the jurisdiction and power to remedy this situation. As this Court held in *Ancient Egyptian Arabic Order N.M.S.* v. *Michaux*, 279 U.S. 732, at pages 744, 745:

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

By failing to give effect to the federal trust, and the federal decree upheld by this Court in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, the judgment of the court below deprived the petitioners and the People of Illinois, the beneficiaries of said trust, of these lands without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the court below exemplifies the danger of having the submerged lands of the Great Lakes, important natural resources, depleted at the expense of the People in violation of said federal trust.

For the reasons stated in this petition, this Court has the ultimate power to interpret the federal decree in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, for the purpose of deciding whether the enormously valuable lands in question are owned by the State or by the railroad, and, thus, whether they are to be developed in the best interests of the People under public guidance or at the whim of the railroad for its private gain. Whatever this Court decides in this respect, at least there will have been a

decision on the merits of this case. It would be incredible, and in frustration of the public interest, for the railroad to be deemed the owner of these lands without the necessity of its proving title thereto.

THE INTEREST OF THE UNITED STATES

The United States also has a substantial interest in the outcome of this case, in addition to the compelling virtue of seeing that its decrees are respected.

Petitioners' complaint alleges that the City requires the air rights over the railroad's tracks at 25th Street, a portion of the air rights involved in this suit, for the construction of an overpass connecting important arterial highways in the City. This overpass will not interfere with the railroad's use of its tracks. The railroad has demanded from the City $2,500,000.00 for these air rights, in spite of the decision of this Court in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77 (R. 3, Page 228).

This overpass recently was built. If the judgment of the court below stands, the City will have to pay the railroad for these air rights. This Court may take judicial notice of the fact that under various federal aid programs to municipalities and states a principal portion of the $2,500,000.00 will be paid by federal matching funds.

That this one example will not be an isolated case is evident from the fact that the lands and air rights in question comprise miles of valuable lakefront lands. Unquestionably, in the future a multitude of recreational, cultural and other public projects will be built on portions of these lands and air rights. In each case it will be necessary for the public authorities to condemn them for the projects, and federal aid will be used. Over a period of time such federal financial assistance could amount to many millions of dollars.

CONCLUSION.

This Petition for a Writ of Certiorari is the last chance available to assert the title the State obtained under the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, to these most important lands and air rights. The decision below, unless reversed by this Court, will be equivalent to a perpetual denial of such title because the petitioners, taxpayers, the State of Illinois and the City of Chicago were all parties. The state court decision, if it stands, will be binding forever upon everybody who could conceivably contest the railroad's usurpation of these lands and air rights owned by the State in trust for the People.

For the reasons mentioned herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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